EMPLOYMENT TRIBUNALS

Claimant: Mr M Glynn

Respondent: Cranswick Country Foods plc t/a Cranswick Continental Foods

HELD AT: Manchester **ON:** 22 & 23 July 2019

EFORE: Employment Judge Porter
Mrs C A Titherington
Ms L Atkinson

REPRESENTATION:

Claimant: Mr Smith, non-practising solicitor

Respondent: Mr Wood of counsel

JUDGMENT

The unanimous judgement of the tribunal is that

1. The claim of wrongful dismissal, breach of contract, is not well-founded and is hereby dismissed;

2. The claims of disability discrimination under Sections 15, 19, 20, 21 and 26 Equality Act 2010 are not well-founded and are hereby dismissed.

3. The claim of unfair dismissal is not well-founded and is hereby dismissed

REASONS

1. Written reasons are provided pursuant to the oral request of the claimant's representative at the conclusion of the hearing.

Issues to be determined

2. At the outset the parties confirmed that the List of Issues had been recorded by Employment Judge Tom Ryan at a preliminary hearing on 9 November 2018. The List of issues were as set out in the Case Management Order, a copy of which appeared at pages 51-59 in the bundle, and is set out in Appendix 1.

3. Counsel for the respondent noted that paragraph 4.3 of the Case Management Order reflected the error made by the respondent in the Amended Grounds of Resistance, in which some other substantial reason was removed from the original pleadings as a potentially fair reason for dismissal and replaced with conduct. Counsel for the respondent made application that some other substantial reason and conduct are considered as alternative potentially fair reasons for dismissal. The claimant had no objection to this application, which was allowed.

Submissions

4. Representative for the claimant relied upon written and oral submissions which the tribunal has considered with care but does not repeat here. In essence it was orally asserted that:-

    4.1. the respondent was using the mobility clause contained in the contract of employment to avoid redundancy on the closure of the factory;

    4.2. the claimant made the respondent aware that he could not travel to Bury because of his disability. The travel time was between 2 and 2 ¼ hours and he could not do it;

    4.3. the claimant was summarily dismissed when he was asked to give up items before the end of his shift;

    4.4. alternatively this was a constructive dismissal. It was reasonable for the claimant not to move to Bury because he could not get there because of his disability. The facts were similar to the case in **Kellogg Brown and Root (UK) Limited v Fitton UKEAT/0205/16.** The claimant was unfairly dismissed;

    4.5. the respondent had full knowledge of the claimant's disability during the course of employment. It had sufficient information prior to the grievance hearing, namely, the claimant's absence in July 2016, the sick note from

that period of absence, an email from the claimant's son about the claimant's hospitalisation and a telephone call from Mr Mark Smith. No HR procedures had been carried out. There was no return to work meeting. If there had been such a meeting the claimant would have disclosed that he had been catheterised;

4.6. the claimant asked his line manager, Dave Shoesmith, what was happening and the email correspondence between Mr Shoesmith and Mr Feenan shows that Mr Shoesmith was aware that public transport was not an option for the claimant because of his disability;

4.7. in his grievance the claimant clearly asserted that the reason for his inability to travel to Bury was because of his disability and that this was known to the respondent. The claimant made it clear that he considered the move to Bury as less favourable treatment for a reason relating to his disability;

4.8. at the grievance hearing the claimant did say that he was catheterised but Mr Keenan was not minded to consider it. He ignored what the claimant had to say. Mr Keenan made no request for the claimant's medical records, made no referral to Occupational Health, gave no thought to the claimant's disability, despite the clear statement in the grievance that it was the claimant's disability that was causing the problem. The EHRC code is clear that the employer must do all it can to find out if a worker has a disability and to assist disabled persons. If Mr Feenan was uncertain as to the claimant's disability then he should have clarified the issues at the meeting and carried out further investigation;

4.9. The requirement to move to Bury was unfavourable treatment of the claimant because of something arising in consequence of the claimant's disability. He could not travel that distance. The respondent has failed to established a legitimate aim and cannot show that the treatment of the claimant was proportionate. It was not reasonable and proportionate to force the move rather than considering redundancy;

4.10. in relation to the claim of indirect discrimination the respondent applied a PCP, the mobility clause, which put the claimant at a substantial disadvantage. The claimant was put into a class of people known as dissenters because he could not travel. The respondent cannot show it was a proportionate means of achieving a legitimate aim because the respondent was enforcing the mobility clause to avoid redundancies and redundancy payments;

4.11. in relation to the failure to make reasonable adjustments there was a PCP, a requirement to move to Bury, which put the claimant at a substantial disadvantage. There was inadequate consideration of alternatives. There was no consideration of the costs of taxi fare for the claimant's journey to

work. That is not supported by the documentary evidence. It is solely contained in Mr Keenan's oral evidence which should be rejected. The respondent could have investigated this further, questioning whether the taxi fare could have been substantially reduced with obtaining a long term contract or with the pickup and drop-off points being different from the claimant's home and final destination. This is an extremely large company with large profits and no reasonable consideration was given as to how resources could be used to help the claimant. He could have been given a different shift, he could have been given financial assistance to learn to drive;

4.12. there was harassment of the claimant. The grievance outcome letter violated his dignity by denying that he was a disabled person. E-mails passing between employees saying that if the claimant could not travel then he must resign violates the claimant's dignity and amounts to harassment within the meaning of section 26 Equality Act

4.13. in essence the relocation of the factory could have been done by way of redundancy and not applying any mobility clause which was discriminatory

5. Counsel for the respondent relied upon written and oral submissions which the tribunal has considered with care but does not repeat here. In essence it was orally asserted that:-

5.1. No express words of dismissal were used by the respondent. The claimant was told that he could either move to Bury or resign. During the course of the grievance the claimant gave clear indication that he would not be attending Bury. The burden is on the claimant to prove dismissal: he has failed to do so;

5.2. the words and conduct of the claimant at the time were indicative that it was the claimant who ended the employment;

5.3. the claimant resigned. He has failed to show a fundamental breach of contract which entitled him to resign;

5.4. the respondent did have did not have knowledge of the claimant's disability. The actual knowledge of the decision maker is important. **Gallop v Newport City Council 2016 IRLR 395**. Mr Feenan had very little knowledge of the claimant's medical condition. The tribunal is invited to accept Mr Feenan's evidence that the note of the grievance meeting prepared on behalf of the respondent is accurate and that the claimant made no reference to catheterisation or a long-term medical condition. The claimant asserts that he told Mr Shoesmith of his medical problem but that

is not set out by Mr Shoesmith in the email to Mr Keenan. The only knowledge Mr Keenan had was the claimant's reference to disability and the bladder problem. An indication of a bladder problem is not by itself indicative of a physical impairment which has a substantial adverse effect on the ability to carry out day-to-day activities. An indication by a man of that age that he could not travel on public transport for a number of hours without access to a toilet does not by itself indicate that the statutory criteria were met. Simply because the claimant used the word disability does not mean that the respondent had actual or assumed knowledge of disability. The burden does not pass to the respondent. If the claimant was not forthcoming enough about his medical condition there is very little the respondent can do: **Rideout v TC Group [1998] IRLR 628;**

5.5. the claims under s15 in section 20 Equality Act must therefore fail;

5.6. the claim of harassment is without merit. Mr Feenan said that he did not believe the claimant met the criteria for disability. This cannot amount to an act of harassment. In cross-examination the claimant agreed that the conclusion was open to Mr Feenan on the facts available at the time. The outcome letter was not a blatant disregard of an obvious disability: it contained Mr Feenan's assessment, an opinion he was entitled to reach bearing in mind what he knew. There is no evidence that Mr Feenan intended his outcome letter to be offensive and it was not reasonable for the claimant to find it offensive;

5.7. In relation to the claim of indirect discrimination the PCP identified in the list of issues is very narrow and the claimant has failed to prove group disadvantage. The PCP is “requiring staff to work from its Bury premises”. There is no evidence that this PCP puts those sharing the claimant's disability at any particular disadvantage. In any event, the respondent asserts that it was proportionate and fair. An objective assessment by the tribunal will show that the discriminatory impact on the claimant was outweighed by business need;

5.8. In relation to the claim of failure to make reasonable adjustments, the respondent was reasonable in enforcing the mobility clause, which was clear and unambiguous. There were no reasonable steps which could have secured the claimant’s employment. The respondent had investigated the provision of transport for all its employees but this was impractical. Instead after extensive consultation it agreed a pay rise for all employees. It considered the costs of taxi fares for the claimant but this was excessive, at a cost of £60 per day, when looking at the claimant’s salary of approximately £25,000 per annum;

5.9. The claimant resigned. There was no fundamental breach of contract entitling him to resign. The respondent enforced the mobility clause reasonably, after extensive consultation and consideration of the matters

raised by its employees. There was a business need to move sites. Bury was the closest available. The exercise of the right was not done in breach of the duty of implied trust and confidence. The claimant rejected the option of car share. There was no work available for him at Guiness Circle in Trafford Park. The claimant seeks in submissions to raise new adjustments but these were not raised either at the time or in evidence before the tribunal;

5.10. In submissions the claimant seeks to add a new allegation of harassment, that is, the email correspondence between the managers. However, he never saw those emails at the time and in any event this has not been addressed in the evidence.

Evidence

6. The claimant gave evidence. In addition, he relied upon the evidence of his son in law, Mr Mark Smith, a non-practising solicitor who also represented the claimant.

7. The respondent relied upon the evidence of Mr Stewart Feenan, Operations and Logistics Director.

8. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

9. An agreed bundle of documents was presented. Additional documents were presented during the course of the Hearing with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

10. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

11. The respondent is a food producer and distributor to the major supermarket chains and food service sector. The Cranswick group employs approximately 10,000 people across the UK, and 126 of those people were employed at the Guinness circle site at Trafford Park, Greater Manchester, of which 48 people were in the warehouse, where the claimant was employed. The respondent also had a second site in Trafford Park.

12. The claimant commenced employment on 21 September 2015. He was highly valued as a good employee. His salary was approximately £25,000.00 per

annum. He was employed as a Quality Assurance Operative on the night shift. The claimant's contract of employment was set out in two interacting documents: one headed employment terms (pages 67 – 68), and the other is headed Contract of employment (pages 69 – 73). This is the same form of contract that was issued to other employees at the two sites in Trafford Park.

13. The claimant's contract of employment contained the following mobility clause:

    13.1. The Employment Terms document which at paragraph 18 stated:

    > "normal place of work 2 Polo Road, Guinness Circle, Trafford Park" …"subject to the provisions of paragraph 12 of the contract below".

    13.2. Paragraph 11 of the Contract of Employment which states:

    > "Your normal place of work is stated at paragraph 17 of the summary, but the company reserves the right to change this on a permanent basis upon one month's notice to you."

14. Both the Employment terms document and the contract of employment contained minor typographical errors in that the Employment terms document wrongly referred to paragraph 12 of the contract when it should have stated paragraph 11. The employment contract made a similar error in that at paragraph 11 it referred to paragraph 17 of the Employment terms document rather than paragraph 18. However, it was not disputed that these clauses were contained in the claimant's contract, and that the claimant understood this to be a mobility clause. There is no evidence from the claimant as to any discussion of the meaning of the mobility clause at interview or prior to him taking up the contract of employment. There is no suggestion that the claimant, or any other member of the workforce at Trafford Park, was ever told that the mobility clause would not be exercised or that it would only be exercised within a certain radius of the existing place of work

15. Towards the end of 2016 the company decided that it had outgrown both of its Trafford Park facilities in terms of storage space and production capacity, and so began to search for a new site suitable to combine both its Trafford Park operations. A suitable site in Trafford Park could not be found and so the company searched further afield, and eventually identified an ideal site in Bury, approximately 13 miles away. As soon as board approval was obtained the respondent commenced a series of consultations with both Trafford Park workforces about the plan to relocate to Bury. The basis of the relocation plan was the mobility clause contained in the contract of employment of every employee, including the claimant. It was the intention of the respondent to transfer every employee from the Guinness circle site to the new site in Bury.

16. In or around January 2017, the respondent's employees were made aware that relocation was a possibility.

17. By written notice dated 16 January 2017 (page 101) it was made clear to all employees that the respondent intended to start a consultation process and would give time to everybody to discuss their thoughts, and informed employees that the building work had now begun on site and that it was envisaged that full occupancy would be in approximately 14 months time.

18. A consultation process began. A works committee was appointed All employees, including the claimant, were offered one to one meetings. Information about the consultation was displayed on noticeboard and on TVs in the canteen. The tribunal does not accept the claimant's evidence that he was excluded from consultation because he was on the night shift. He saw the TV screens and had access to all the relevant information. He also discussed the move with his direct line manager, Dave Shoesmith, night shift manager, on a regular basis.

19. During the consultation period the respondent investigated the provision of transport to and from Bury for all of its employees. It decided that it was not a reasonable step because of the flexibility of shifts and the number of pickup points. Instead, it offered a loyalty bonus of one thousand pounds to each employee. When that was expressed to be unacceptable to the majority of the employees the respondent then decided to give a pay rise of 75p per hour to each employee. Some employees raised concerns around getting home after the end of the 11.00pm shift from the new location in Bury. In order to alleviate employees' concerns, the respondent agreed to provide, at least for a period of time, a bus for collection from Bury back to three drop-off points at the end of the 11.00pm shift. The respondent also promoted the use of car share. This suggestion was taken up by a number of employees working on the night shift.

20. The respondent took into account the worries and concerns raised by employees and sought to alleviate them.

21. The respondent company informed each of the employees, including the claimant, that the company sought to rely on the provision of the contractual mobility clause to avoid dismissing anyone who disagreed to the move. Each of the employees, including the claimant, was informed that if he refused to accept the move to Bury then this would be taken as their resignation

22. After the consultation period of the approximate 500 employees affected by the move from Trafford Park, only 5 or 6, including the claimant, refused to move to Bury. The date fixed for the move was Monday 23 April 2018. It was planned that work at the Guinness Circle Site would finish at the weekend of 21/22 April 2018.

23. The respondent concedes that the claimant was, at the relevant time, a disabled person within the meaning of the Act. They did so after presentation of the claim and the claimant providing medical evidence of his physical impairment, a urinary tract disorder.

24. The claimant began self-catheterising in February/March 2016. He did not tell anyone at work about it because he was embarrassed by it. It did not affect his ability to do the job as he had access to toilet facilities at all times. He did not tell the respondent about the physical impairment which led to the need for self-catheterisation.

25. In July 2016 the claimant was hospitalised. By email dated 8 July 2016 (page 132) his son advised the respondent that the claimant was then in Salford Royal Hospital, continuing:

> He was admitted on Wednesday night with high potassium levels and dehydration. The water infection he had has caused him to become dehydrated and because of the infection he struggled passing water which caused the high potassium…
> He is currently on a drip and has been catheterised…
> They are doing a scan on his kidneys to… make sure there is no damage to them as he is still passing blood in his urine.

26. Attached to the email was a fit note in which the claimant's GP indicated that the claimant was not fit to work from 6 July to 13 July 2016 because of urinary obstruction and acute kidney injury.

27. On or about 8 July 2016 Mr Mark Smith, the claimant's son-in-law, telephoned the HR Department of the respondent company and told the person who answered the phone that the claimant was currently in hospital, that he now catheterised and that he had injured himself whilst doing so. Mr Smith said that it was being suggested that the claimant be discharged but he still had a catheter with a bag and the claimant was concerned that he would be unable to go back to work if he had a permanent catheter with a bag.

28. Mr Mark Smith did not make a written record of the conversation he had with the HR representative. No record of that conversation was retained on the claimant’s personnel file.

29. The claimant was discharged from hospital. The claimant refused to leave hospital with the permanent catheter and a bag because he had serious concerns about whether the respondent would allow him back to work with the strap to his leg given that he worked with food.

30. The claimant returned to work soon after his discharge from hospital. He did not have any further sickness absence. On his return to work he did not have a return to work interview. This would be normal practice for any length of absence due to ill-health. The claimant did not request a return to work interview, did not discuss with anyone his medical problem, did not tell his line manager or any other officer of the respondent company that he had a permanent injury to his kidneys and/or that he was self catheterising.

[The tribunal does not accept the evidence of the claimant that it was made known to his line manager that he had a permanent medical problem and that he was self-catheterising. The claimant's evidence on this is unsatisfactory and is unsupported by any corroborative evidence. In reaching this finding the tribunal notes that the claimant did not discuss the self-catheterisation prior to his hospitalisation because of embarrassment, that he was concerned for his job if the respondent became aware of his medical problem and catheterisation. The claimant has not provided a satisfactory explanation as to why he would now discuss this matter in work. The tribunal is satisfied and finds that he did not.]

31. In or around February 2018 the claimant investigated how long it would take him to travel from home to work in Bury. He knew that the night team would be required to move to Bury in April 2018. The claimant's search on the Internet show that it would take him between 1.45 hours and 2.5 hours to travel to and from work on public transport. He looked at moving to Bury but noted that the housing costs in Bury were very expensive.

32. In or around March 2018 the claimant told David Shoesmith that he would not be able to travel that length of time to Bury. He explained that he had no means of getting to Bury, he could not drive and public transport was not an option for him. The claimant did not tell Mr Shoesmith that the reason he could not use public transport was because he had a physical impairment, and/or damage to his kidneys and/or a urinary tract disorder and/or that he self-catheterised. The claimant did not give a reason.

    [There is no satisfactory evidence to support the claimant's assertion that he informed David Shoesmith at that time the reason why public transport was not an option for the claimant. The tribunal notes that Mr Shoesmith reported the claimant's concerns to Mr Feenan by email (see the paragraph below). There is no evidence to suggest that Mr Shoesmith omitted any relevant detail from that email, no evidence to suggest that he had any reason for doing so. The tribunal is satisfied and finds that Mr Shoesmith accurately reported what the claimant had told him]

33. By email dated 21 March 2018 (page135) Mr Shoesmith wrote to Mr Feenan in the following terms:

    Michael has been asking again about when he will hear anything about the move to Bury
    he is aware that his contract of employment states that he should receive four weeks notice of the relocation to Bury and that is at the end of this week.
    He has no means of getting to Bury. He cannot drive and public transport is not an option for him.
    Is there anything that you can say to him?

34. By email dated 21 March 2018 (page134) Mr Feenan replied to Mr Shoesmith in the following terms:

> Can you pls speak privately with Michael and inform him that our last working day and night shift at Guinness will be Friday the 20.04.18 after which all our warehouse staff will relocate to Bury.
> I fully understand Michael's predicament and very sorry that he can't resolve the transport problem.
> Beyond 20.04.18 production will continue at Guinness for a very limited time until they themselves relocate to Bury so unfortunately there is no scope for Michael to stay on beyond this date and therefore conclude that he will have to resign his employment.
> Hopefully Michael will understand the situation but Rob and myself will both be in early next Saturday morning for stock account should he wish to discuss

35. Mr Shoesmith replied by email on 21 March 2018 in the following terms:

> I have spoken with Michael and relayed the information. He has booked a holiday on the Friday before the stock check. However, I have said that if he wants to discuss anything he can stay later or come in to see you. He's obviously upset.

36. On or about 5 April 2016 the claimant recollected an email dated 21 March 2016 in which the respondent company had explained that if he was not prepared to move to Bury then he should resign. The claimant thought this was unfair and therefore raised a grievance on 12 April 2018 (page 138a), extracts from which read as follows:

> I write further to the relocation of the workplace to Pilsworth Bury and I wish to raise a grievance as I consider the move to be a fundamental breach of contract and unfortunately I will not be attending the Pilsworth depot on 20 April
>
> Travel
> As you are aware, I currently live in Irlam and my current commute to work one way is approximately 30 mins and I am able to catch one bus.
>
> The relocation of the workplace to Pilsworth, will increase my current travelling time to approximately 1.45 – 2.15 hours and I will have to catch two buses and a two tram. It also will increase the cost of my commute to work dramatically.
>
> Moreover, I feel that given how unreliable public transport is, I am going to have to set off earlier and effectively I will end up travelling an additional 15 – 25 hours a week commuting to work.
>
> Disability
>
> Furthermore, unfortunately, as you are aware, I have problem with my bladder and I do not think that I will be able to travel for that length of time without having to use toilet facilities. Making me travel this length of time with my disability is obviously less favourable treatment.
> .....
> Request

In the circumstance I have been with the company for a period of 2.5 years, and I would like the company to consider my service.

I really enjoy working with the company and I understand that the Guinness circle location is still going to be used by the company and I wonder whether it might be possible that my position or an alternative position could be found me at Guinness circle as this would be a reasonable adjustment.

If there is no suitable alternative, but to move, I will consider that I have been dismissed or that this is a redundancy situation. apl have been shown an email from Rob Jepson saying that if I was unable to travel then I would have to resign however I will not be resigning.

If I do not get a satisfactory response prior to 20th April I assume I have been dismissed as I have been discriminated against and I will take any further action as I am so advised

37. By letter dated 17 April 2018 (page 138b) the claimant was invited to a grievance meeting with Mr Feenan on Saturday 20th April at 6am.

38. The claimant attended that grievance meeting on 20 April 2010. Rob Jensen attended the meeting to take notes. The claimant was advised in advance of his right to be accompanied but chose not to be.

39. Those notes were not agreed by the claimant who on 10 July 2018 sent to the respondent amendments to those notes. The notes taken by Mr Jepson were contemporaneous notes of the meeting. The claimant did not take any notes of the meeting at the time. On balance the tribunal does not accept that the claimant's amended notes (page 140a) are an accurate record of the meeting. The claimant's evidence as to what was said during that meeting is unsatisfactory. He admits himself at times that his recollection of that meeting is poor. On balance the tribunal accepts the evidence of Mr Feenan that the respondent's notes at page 139 represent an accurate record of what was said in the meeting (although it is not a fully complete record of everything that was said at that meeting).

40. At the grievance meeting Mr Feeney gave a brief summary of the reason for the business relocating from Trafford Park to Bury. The claimant said that he could not get to Bury due to public transport being unsuitable because he could not travel for that length of time due to problems with his bladder following a kidney failure. Mr Feeney responded that whereas the claimant had written in his grievance that the respondent was aware of the issue with his bladder and his disability, the company was not aware of such disability and asked the claimant if he was certain that he had told the company of this. The claimant said that he was off sick two years ago. Mr Feeney agreed that the claimant was off sick but had not informed the company of any ongoing issues. The claimant conceded that this probably was the case. Mr Feeney told the claimant

that there was a job for him at Bury and ideally the company would like the claimant to join them at Bury, explaining that there was a mobility clause in his contract and the company was within their rights to relocate: this was not a redundancy situation. Mr Feeney confirmed that there was no job requirement for the claimant in Trafford Park in his current role. Mr Feeney offered to find the claimant work at Guinness circle for temporary work for up to 2 weeks but the claimant rejected that offer. There was a discussion about a possible car share, whether the claimant had enquired with colleagues about them helping with transport in the form of a lift. The claimant indicated that he was not interested in a car share because he did not like to rely on others, and it was impractical because he would probably have to get a bus from Irlam anyway, as well as contributing to petrol money. The claimant rejected this is an option during the grievance meeting. The claimant did not tell Mr Feeney that he was self catheterising, or that he suffered from a long term physical impairment which meant that public transport was unsuitable for him. On this the tribunal accepts the evidence of Mr Feeney.

41. The claimant attended work for the night shift on 20th/21st April 2018. The factory was closing down that weekend with all employees, including the claimant, being required to attend work at Bury on the following Monday morning 23 April 2018. This was the last shift of work available at these factory premises. Towards the end of the shift, at approximately 4am on 21 April 2018, the claimant was asked to empty his locker and return all company property. This was done at this time because the work had come to an end and there was no further work available to the end of the shift.

    [This is the undisputed evidence of Mr Feeney.]

42. The claimant was aware that this was the final shift at Guinness Circle and that there was a job waiting for him in Bury on Monday 23 April 2018.

43. By email sent on 21 April 2018 at 9:21am Mr Feenan advised colleagues that the claimant had left the company after completing his final shift on the morning of Saturday 21 April. Mr Feenan did not wait to see whether the claimant attended work at Bury on 23 April before deciding that the claimant had resigned from his employment at the end of his final shift.

44. In considering the claimant's grievance Mr Feenan asked HR for details of any sickness absences and fit notes. He was provided with details and fit note relating to the absence in July 2016 (see paragraph 26 above). He was not provided with a copy of the email sent by the claimant's son at that time. He was unaware of the telephone call from Mr Smith (see paragraph 27 above). There is no record of that telephone call on the claimant's HR file. In reaching his decision Mr Feenan:

44.1. did not request sight of the claimant's medical records or ask that the claimant attend Occupational Health for examination;

44.2. noted that the claimant had an excellent attendance record with only one absence recorded in July 2016;

44.3. considered the cost of providing the claimant with a personal taxi service to and from work. He noted that the cost of a taxi would be approximately £30.00 each way. He weighed that cost against the claimant's annual salary and decided that it was not reasonable for the respondent to bear that cost to retain the claimant in employment;

44.4. noted that there were no suitable jobs remaining in Trafford Park which the claimant could fill on a permanent basis. The offer to provide the claimant with temporary work had been rejected;

45. There were no suitable jobs available at Trafford Park for the claimant. There were a couple of managerial positions available for which the claimant did not have the necessary skills. The respondent had the requirement for the claimant as a Quality Assurance Operative on the night shift at the new premises at Bury. There was no reduction in the need for Quality Assurance operatives in the respondent's business.

46. By letter dated 25 April 2018 (page 144) Clare Baker, General Manager, informed the claimant of the grievance outcome. The letter was drafted by Mr Feenan and approved by him but sent in the name of Clare Baker because Mr Feenan was on holiday. The letter confirmed the outcome of the grievance, dealing with each of the grounds. In summary Mr Feenan concluded that:

46.1. the move to Bury did not amount to a fundamental breach of contract. He explained in his outcome letter how the move was in accordance with the claimant's contract of employment and how the claimant had been given adequate notice;

46.2. in relation to the complaints that the commute would be excessive and the claimant was not able to move closer, Mr Feenan concluded that the claimant had not looked into whether options to commute were a solution and that the claimant had himself concluded that the options raised by Mr Feenan were not really options for him;

46.3. as to the assertion that the claimant was disabled, Mr Feenan confirmed that he had said at the grievance hearing that he was not aware of the claimant's medical condition until he raised it and that Mr Feenan had therefore looked into this matter further. the letter states

> You made reference (at the grievance meeting) to a bladder issue, of which you were sure that you had advised the company. I was not aware of such an issue,

but as you had raised this I undertook to investigate this. At our meeting you referred to having been off sick two years ago and agreed that you had not advised the company of any ongoing issues relative to this problem. I also noted the medical information from your HR file which supported this. Accordingly, it did not appear to me that your condition meets the criteria of disability in terms of the Equality Act 2010. I did not uphold this head of your grievance;

46.4. in relation to the claimant's criticism of the consultation process Mr Feenan noted that notice information on the move to Bury had been publicised in various formats including noticeboards, TV displays and working groups. He therefore rejected the claimant's grievance on this head.

47. Each of the grounds of complaint was not upheld. The claimant was advised of the right to appeal against the decision within five days of the date of the letter.

48. The claimant which was issued with a P45, which was processed as a leaver on 25 April 2018, stating a leaving date of 20 April 2018 (page 147).

49. The claimant did not appeal the grievance outcome.

The Law

Dismissal or resignation

50. To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. A contract of employment may terminate in a number of different ways but the circumstances in which an employee is treated as having been dismissed for the purposes of an unfair dismissal claim are limited. In this case, the claimant would have to show that his contract of employment was terminated by the employer, whether with or without notice; or that he terminated the contract by resigning, whether with or without notice, but in circumstances in which he was entitled to do so by reason of the employer's conduct (constructive dismissal).

51. Dismissal does not include termination by the employee in a situation not amounting to constructive dismissal, ie genuine voluntary resignation.

52. Where a contract of employment is brought to an end by the express act of the employer, this is clearly a dismissal whether the employer gave notice or terminated the contract with immediate effect. Notice of dismissal can only generally be effective if and when received by the employee, ie the dismissal has to be communicated to be effective.

53. If ambiguous words are used to terminate a contract of employment, for example when ‘notice’ may have more than one meaning, such as the

employee giving notice of leaving one department to move to another with the same employer rather than of ending employment completely, the court or tribunal should ask how they would have been understood by a reasonable listener, taking into account what that listener knew about the circumstances. Later events can be taken into account in that interpretation provided that they are genuinely explanatory of what happened and do not reflect a change of mind.

Constructive dismissal

54. The Tribunal referred to section 95(1)(c) and section 136(1)(c) of the Employment Rights Act 1996 ("ERA") and to **Western Excavating (ECC) Limited v Sharp [1978] ICR 221** and the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**.

55. The first question is whether the employer committed a fundamental (or repudiatory) breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is question of fact and degree.

56. The employer's repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause: **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**.

57. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for the resignation: it is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned, wholly or partly, in response to the employer's breach rather than for some other reason: **Weathersfield Ltd v Sargent [1999] IRLR 94**.

58. In **Malik and anor v Bank of Credit and Commerce International SA 1997 ICR 606** the House of Lords held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is "inevitably" fundamental. **Morrow v Safeway Stores plc 2002 IRLR 9**. Brown-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** EAT described how a breach of this implied term might arise: "*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*".

Disability Discrimination

59. Section 15(1) Equality Act 2010 provides:

A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

60. The tribunal has considered The Code of Practice on Employment 2011 and in particular the following:

5.11 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a proportionate means of achieving a legitimate aim. This objective justification test is explained in detail in paragraphs 4.25 to 4.32.

5.12 It is for the employer to justify the treatment. They must produce evidence to support the assertion that it is justified and not rely on mere generalisations.

4.28 The concept of legitimate aim is taken from European Union law and relevant decisions of the Court of Justice of the European Union… it is not defined by the Act. The aim of the provision criterion or practice should be legal, should not be discriminatory in itself, and must represent a real objective consideration.

4.29 Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test.

4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

4.31 Although not defined by the Act, the term proportionate is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an appropriate and necessary means of achieving a legitimate aim. But necessary does not mean that the provision criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.32 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision criterion or practice if there are other good reasons for adopting it.

61. Section 20 Equality Act 2010 provides that the duty to make reasonable adjustments comprises of three requirements, set out in s20(3), (4) and (5): Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

62. s20(3) states:

> The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

63. The Code of Practice on Employment 2011 sets out, at chapter 6, principles and application of the duty to make reasonable adjustments for disabled people in employment. It describes the duty to make reasonable adjustments as 'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'. This can, as HHJ Peter Clark said in **Redcar and Cleveland Primary Care Trust v Lonsdale UKEAT/0090/12, [2013] EqLR 791, [2013] All ER (D) 34**, involve 'treating disabled people more favourably than those who are not disabled'.

64. Section 26 Equality Act 2010 provides:-

> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating these dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

65. The EHRC Code of Practice on Employment 2011 provides, in relation to harassment under section 26:

> 7.6 This type of harassment (harassment related to a protected characteristic) of a worker occurs when a person engages in unwanted conduct, which is related to a relevant protected characteristic and which has the purpose or the effect of:
>
> Violating the worker's dignity; or

Creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

7.7 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word “unwanted” means essentially the same as “unwelcome” or “uninvited”. “Unwanted” does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

7.16 For all three types of harassment, if the purpose of subjecting the worker to the conduct is to create any of the circumstances defined in paragraph 7.6, this will be sufficient to establish unlawful harassment. It will not be necessary to enquire into the effect of that conduct on the worker.

7.17 Regardless of the intended purpose, unwanted conduct will also amount to harassment, if it has the effect of creating any of the circumstances defined in paragraph 7.6.

7.18 in deciding whether conduct had that effect, each of the following must be taken into account:

(a) the perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment;

(b) the other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which to conduct takes place.

(c) whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

66. The Tribunal must consider all surrounding circumstances and may draw any appropriate adverse inference in deciding whether the unwanted conduct did have that purpose.

67. The cases relating to harassment claims under the legislation prior to the Equality Act are of some assistance. We note **Richmond Pharmacology v Dhaliwal 2009 ICR 724** in which the EAT noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions the tribunal should then consider whether it was

reasonable for him or her to do so. In deciding whether the claimant did experience these feelings or perceptions the tribunal must apply a subjective test. However, we note the decision of the Court of Appeal in **Land Registry v Grant 2011 ICR 1390** in which the court commented that tribunals must not cheapen the significance of the words (violation of dignity or intimidating hostile degrading humiliating or offensive environment) because they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. It follows from this that the fact that a claimant is slightly upset or mildly offended by the conduct in question may not be enough to bring about a violation of dignity or offensive environment.

68. In deciding whether it was reasonable for conduct to have that effect an objective test is applied. Whether it was reasonable for a claimant to have felt his dignity to have been violated is a matter for the factual assessment of the Tribunal taking into account all the relevant circumstances including the context of the conduct in question. The Tribunal must consider whether it was reasonable for the conduct to have that effect on that particular claimant.

69. An employer has a defence to a claim under section 15 if it did not know that the claimant had a disability. This stipulates that subsection (1) does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know' of the employee's disability. However, the employer cannot simply turn a blind eye to evidence of disability. While the Equality Act stops short of imposing an explicit duty to enquire about a person's possible or suspected disability, the EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14.

70. The Code also states that knowledge of a disability held by an employer's agent or employee — such as an occupational health adviser, personnel officer or recruitment agent — will usually be imputed to the employer.

71. The employer's defence to a claim of failure to make reasonable adjustments under para 20 of Schedule 8 to the Equality Act states that the duty to make reasonable adjustments does not arise if the employer 'does not know, and could not reasonably be expected to know' that an individual has a disability and is likely to be placed at a substantial disadvantage by one of the employer's practices or a physical feature of its premises. Case law on reasonable knowledge under both para 20 of Schedule 8 and its precursor, S.4A Disability Discrimination Act is therefore likely to be relevant to the question of reasonable knowledge under S.15(2) Equality Act.

72. While knowledge of the disability places a burden on employers to make

reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for so doing. **Ridout v TC Group 1998 IRLR 628, EAT.**

73. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues
(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

Wrongful dismissal

74. We have considered whether the claimant was dismissed. There were no express words of dismissal. We have considered all the circumstances to determine whether a reasonable employee would regard the words and actions of the respondent as amounting to a dismissal. The tribunal notes in particular the following:

74.1. The respondent informed the claimant that there was a job waiting for him in Bury;

74.2. The claimant gave a clear indication in his grievance and at the grievance hearing that he would not work in Bury;

74.3. He attended work for the night shift on 20th/21st April 2018. The factory was closing down that weekend with all employees, including the claimant, being required to attend work at Bury on the following Monday morning, 23 April 2018. This was the last shift of work available at these factory premises. Towards the end of the shift the claimant was asked to empty his locker and return all property;

74.4. It is Mr Feenan's undisputed evidence that this was done because the work had come to an end and there was no further work available up to the end of the shift. These were actions consistent with the closing down of the factory and the claimant's clear statement that he would not be taking up the job offer in Bury;

74.5. The claimant was aware of the mobility clause in his contract of employment, was aware that if he refused to move to Bury in accordance with that clause then the respondent would take this as his resignation;

74.6. The claimant had declined an offer of temporary alternative work at the grievance hearing.

In all the circumstances the tribunal finds that a reasonable employee would not regard the words and actions of the respondent on 21 April as dismissal. It is clear that the contract of employment was terminated by the claimant's refusal to attend work at Bury. The actions of the claimant amounted to a resignation.

75. The next question is whether the respondent committed a repudiatory breach of the claimant's contract entitling him to resign. There was an express mobility clause in the claimant's contract of employment. The request to move to Bury fell within that clause. The respondent did not act vexatiously or capriciously in enforcing that term of the contract on the claimant and the remainder of the workforce. There was a genuine business need for the removal of the business premises to Bury. The respondent did not act in breach of the implied term of trust and confidence in implementing the mobility clause. It gave the entire workforce, including the claimant, plenty of notice of the move, entered into extensive consultation with the workforce. Clearly the move to Bury had an adverse impact on the claimant and other members of the workforce. Requiring the claimant to move to Bury, when he did not drive and relied on public transport did damage the working relationship between them. The claimant was upset by the move and the respondent knew that. However, the respondent acted in this way because of a genuine business need, the need for bigger work premises. The respondent did not without reasonable and proper cause, conduct its business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

76. The claimant was not dismissed. The claim of wrongful dismissal is not well-founded and is hereby dismissed.

Disability discrimination

Knowledge of disability

77. In relation to the claim of disability discrimination the respondent concedes that the claimant was a disabled person within the meaning of the Act.

78. The first question is whether the respondent knew or ought to have known that the claimant was a disabled person at the relevant time, that is, during the course of his employment which terminated on 21 April 2018.

79. On balance, the tribunal accepts the evidence of Mr Feenan that the claimant did not at the grievance hearing on 20 April 2018 say that he was self-catheterising or catheterised. That is consistent with the contemporaneous document prepared on behalf of the respondent. The claimant informed the respondent that he had a bladder problem but he did not give any further details. He accepted at the grievance hearing that he had not advised the respondent of any ongoing issues after his hospitalisation in July 2016. He did

not tell David Shoesmith prior to his resignation that he was self catheterising. We do not accept the claimant's evidence on that point as it is inconsistent and unsatisfactory. The claimant was admitted to hospital in July 2016 and the respondent was informed at that time that the claimant was catheterised, while in hospital, and his sick note indicated an acute infection with possible damage to his kidneys. There was no return to work meeting. That was unfortunate. However, the claimant did not at any time thereafter tell his line manager or other officer of the respondent that he had damaged his kidneys, or that he was self-catheterising. There was no indication to the respondent that the claimant, after that incident, was suffering from any ongoing medical condition. By the time of the grievance hearing the respondent was aware that the claimant had a bladder problem and that he did not think that he could travel for one and a half – 2 ¼ hours without having to use toilet facilities. However, the claimant did not say that he had a long term problem, did not say that he remained in need of medical treatment, did not say that he experienced pain because of his bladder problem, did not say that he was self-catheterising or catheterised. We bear in mind that in his grievance the claimant did assert that he had a disability and that the enforced move to Bury was an act of discrimination. That put the respondent on notice that the claimant may have been disabled and that was investigated at the grievance hearing, when the claimant had full opportunity to put his case, to explain why he said he was disabled, why he said he was being discriminated against. However, the claimant at that meeting did not disclose the relevant information, did not disclose the nature and extent of any medical problem, its effect on his ability to carry out day to day activities and, importantly, the fact that he self-catheterised. A vague reference to a bladder problem and a hospitalisation two years previously was not enough. Mr Feenan was reasonable in restricting his investigation of the problem to a review of the claimant's absence record relating to the hospitalisation in July 2016. That was the only incident referred to by the claimant in the grievance meeting. In the absence of the claimant informing Mr Feenan that he had a continuing medical impairment or condition, in the absence of the claimant telling Mr Feenan that he was self-catheterising or catheterised, it was reasonable for Mr Feenan to reach his decision on disability without seeking medical evidence or an OH report. The claimant gave no indication that there was any ongoing medical problem to investigate. In these circumstances Mr Feenan was reasonable and genuine in assessing the incident in July 2016 as a one-off incident, with no continuing implications, and that the claimant did not have a long term physical impairment, and did not satisfy the definition of a disabled person within the meaning of the Equality Act 2010.

80. In all the circumstances the tribunal finds that the respondent did not know, and did not ought to have known, that the claimant was a disabled person during the course of his employment.

81. The respondent did not have the requisite actual or constructive knowledge of the disability and therefore the claims of disability discrimination under s15 and 20 Equality Act must fail.

82. However, in the alternative, if we are wrong on that, we have considered the claims of disability discrimination.

Duty to make reasonable adjustments

83. In relation to the claim of failure to make reasonable adjustments, the respondent applied a PCP of requiring its staff to work from its Bury premises. The respondent accepts that the application of that provision put the claimant at a substantial disadvantage in comparison with persons who are not disabled in that the claimant was unable to travel to Bury from Irlam by public transport.

84. The question for the tribunal is whether the respondent took such steps as were reasonable to avoid or reduce the disadvantage. The step identified in the list of issues is the provision of transport. The respondent had investigated the provision of transport for all of its employees during the course of the consultation. It had decided that it was not a reasonable step because of the flexibility of shifts and the number of pickup points. Instead it offered a loyalty bonus of one thousand pounds. When that was expressed to be unacceptable to the majority of the employees the respondent then decided to give a pay rise of 75p per hour to each employee. The respondent also organised a bus service for a late finishing shift and promoted the use of car share. At the grievance hearing on 20 April 2018 the respondent discussed with the claimant the provision of transport in particular the possibility of the claimant becoming part of a car share arrangement. The claimant was not interested in that option. Mr Feenan considered the option of paying for the claimant to attend work by a private taxi but decided that at a cost of £30 each way it was disproportionate, bearing in mind the level of earnings of the claimant. On balance we find that the respondent did take all reasonable steps. It provided the claimant with a pay rise towards the cost of transport. It promoted the use of car share. The provision of a private taxi service for the claimant was not reasonable. However large the company, however large the respondent's profits, the respondent was reasonable in weighing the cost of taxi fares against the claimant's salary level.

85. It was not a reasonable step to allow the claimant to remain at Trafford Park on a permanent basis. There was no suitable available job for him there. The claimant rejected an offer of work on a temporary basis.

86. The claimant has not in evidence before the tribunal identified any reasonable step which would have avoided or reduced the disadvantage. He has raised in submissions different steps to those identified in the list of issues and considered as part of the evidence. For example, in submissions the claimant raises the suggestion of sharing the cost of a taxi, reducing the cost by

obtaining a contract, obtaining assistance from Access to work. However, no evidence has been led on these matters. The claimant has provided no evidence as to whether the cost of a taxi could be reduced by these options, whether Access to Work could have provided any assistance to the claimant. Mr Feenan was not given the opportunity to address these alternatives when giving evidence. There is no evidence that the claimant wished to learn to drive: this was not raised either at the time or during the course of the evidence before the tribunal. The claimant has in submissions suggested that he could have worked a different job in Bury and/or different shifts. However, this was not identified as an issue prior to this hearing, no evidence has been led on that suggestion, as to how that would work, whether there were any such jobs, how that would reduce or avoid the disadvantage to the claimant.

87. The claim of failure to make reasonable adjustments is not well-founded.

S15 Equality Act 2010

88. In relation to the claim of less favourable treatment under s15 Equality Act, the respondent admits that the requirement to work in Bury placed the claimant at a substantial disadvantage when compared with non-disabled persons. The question for the tribunal is whether the treatment was a proportionate means of achieving a legitimate aim. The aim was to move the business forward to bigger premises because the business had outgrown the existing premises in Trafford Park. That is a legitimate aim. In deciding whether this was a proportionate means of achieving that legitimate aim the tribunal has conducted a balancing exercise, weighing the discriminatory effect of the provision criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts. The tribunal notes, in particular, that:

88.1. there was a valid contractual mobility clause in the claimant’s contract of employment;

88.2. the respondent gave plenty of notice of the proposed move and entered into extensive consultation with the workforce including the claimant. A works committee was appointed. All employees, including the claimant, were offered one to one meetings. Information was displayed on noticeboards and on TVs in the canteen. We do not accept the claimant’s evidence that he was excluded from consultation because he was on the night shift. He saw the TV screens and had access to all the relevant information. He also discussed the move with his direct line manager on a regular basis;

88.3. Approximately 500 employees were required to move to Bury by the respondent exercising its right to move the employees under the mobility clause. All but 5 or 6 employees did move;

88.4. The claimant and every other member of the workforce were given a pay rise to contribute to the additional cost of travel;

88.5. The claimant chose not to raise problem with his bladder and travel until very late in the proceedings;

88.6. There was no suitable alternative employment for the claimant in Trafford Park following the move of the work premises to Bury;

88.7. It was reasonable and proportionate for the respondent to reject the suggestion that the claimant be made redundant rather than enforce the mobility clause against him personally. The respondent is entitled to take advantage of the contractual mobility clause. The respondent informed the claimant that there was a job waiting for him. There was no redundancy. There was no requirement for a reduction in the workforce. The claimant's place of work included Bury because of the mobility clause.

It is unfortunate that claimant, a highly valued employee, lost his job because of the move to Bury. However, in all the circumstances the tribunal finds that the treatment of the claimant was a proportionate means of achieving a legitimate aim.

89. The claim under s15 Equality Act 2010 is not well-founded.

Indirect discrimination

90. In relation to the claim of indirect discrimination the PCP applied is as identified in the list of issues as requiring staff to work from its Bury premises. The tribunal agrees with the respondent that the claimant has adduced no evidence that the application of the PCP put other disabled person at a particular disadvantage. In any event, this was a proportionate means of achieving a legitimate aim for the same reasons as discussed in relation to the claim of less favourable treatment under section 15.

91. The claim of indirect discrimination is not well-founded.

Harassment

92. In relation to the claim of harassment Mr Feenan did not write the grievance outcome letter with the purpose of humiliating the claimant or causing offence. On this the tribunal accepts the evidence of Mr Feenan. There are no facts from which the tribunal could conclude that this was Mr Feenan's purpose or intention. It is clear from the wording of the emails between Mr Feenan and the managers that Mr Feenan was happy to discuss the problem with the claimant, that he was prepared to listen. There is no suggestion that Mr Feenan acted in an inappropriate or bullying manner during the course of the grievance hearing.

93. In deciding whether the grievance outcome letter had the effect of violating the claimant's dignity or creating an intimidating or offensive environment the tribunal has considered all the circumstances of the case, the claimant's perception and whether it is reasonable for the conduct to have that effect. The tribunal does not accept that the claimant was humiliated by receipt of this letter. In any event, the receipt of the outcome letter, in which Mr Feenan expressed his opinion/assessment as to whether the claimant fell within the definition of a disabled person within the meaning of the Equality Act, does not amount to harassment within the meaning of the Act. It is not reasonable for the conduct to have that effect.

94. Again, the claimant has raised new matters in submissions which were not contained in the List of Issues, were not considered as part of the evidence. The allegation that the exchange of emails between managers amounted to harassment within the meaning of the Equality Act does not fall for determination by this tribunal.

95. The claim of harassment is not well-founded.

96. In the circumstances the claims of discrimination are not well-founded and are hereby dismissed.

Unfair dismissal

97. In relation to the claim of unfair dismissal, the claimant was not dismissed. Further, and in the alternative, if he was dismissed then the reason for dismissal was his refusal to move to Bury. That is some other substantial reason, a potentially fair reason for dismissal.

98. The tribunal has considered whether dismissal fell within the band of reasonable responses. We have considered all the circumstances and refer to our findings in relation to s15 Equality Act. We note in particular that:

    98.1. There was an express mobility clause in the claimant's contract and the contracts of all other members of the workforce;

    98.2. The respondent notified the workforce including the claimant well in advance of the move to Bury;

    98.3. Extensive consultation took place. The claimant was given the opportunity to participate in the consultation and to attend individual meetings;

    98.4. A fair procedure was followed;

98.5. Efforts were made to try to retain the claimant in employment. His grievance was heard. He was offered temporary employment. There was no alternative permanent employment available for the claimant in Trafford Park. The claimant was encouraged to participate in a car share;

98.6. The claimant was given a pay rise to assist in the additional travel costs;

98.7. Of approximately 500 employees affected by the move only a very small number, 5 or 6, refused to move;

98.8. Failing to pay for the claimant to use a taxi service to travel to and from work fell within the band of reasonable responses

In all the circumstances the tribunal finds that dismissal did fall within the band of reasonable responses. The dismissal was fair.

Employment Judge Porter

13 August 2019

Judgment and reasons sent to the parties on
22 August 2019

For the tribunal office

APPENDIX 1

List of Issues to be determined

Unfair dismissal claim

4.1. Was the claimant dismissed? This is not admitted. The respondent asserts that the claimant resigned. The claimant denies doing so.

4.2. If, however the claimant is found to have resigned, he will contend that the respondent committed a repudiatory breach of the claimant's contract of employment by seeking to compel him to change his place of work unreasonably in all the circumstances.

4.3. What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the conduct alleged and that this was the reason for dismissal.

4.4. Did the respondent form that belief having carried out a reasonable investigation?

4.5. The claimant's case is that the dismissal was unfair because the respondent dismissed him for failing to comply with the provisions of an unreasonable mobility clause.

4.6. Was the decision to dismiss within the reasonable range of responses for a reasonable employer?

4.7. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

4.8. Can the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event and at what point? Alternatively, is there a chance the claimant would have been fairly dismissed?

5. Disability

5.1. Did/does the claimant have a physical impairment, namely a bladder condition requiring continued catheterisation.

5.2. The respondent accepts that the claimant was a disabled person at all material times.

5.3. The respondent disputes that it knew or ought to have known that the claimant was a disabled person until 9 May 2018.

5.4. The claimant contends that the respondent's date of knowledge was July or August 2016 when Mr Smith telephoned the respondent and informed them that as a

result of the claimant being hospitalised he would be self-catheterising from that point in time. Moreover, the respondent could have held a return to work meeting with the claimant which would have given them further insight into the claimant's medical condition but did not do so.

6. **Section 26: Harassment related to disability**

6.1. Did the respondent engage in unwanted conduct as follows:

6.1.1. on 25 April 2018 the respondent asserted that the claimant was not a disabled person in a letter.

6.2. Was the conduct related to the claimant's protected characteristic of disability?
6.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.4. If not, did the conduct have the effect of violating the claimant's dignity or creating such an environment for the claimant, having regard to: the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. **Section 19: Indirect discrimination in relation to disability**

7.1. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring staff to work from its Bury premises.

7.2. Does the application of the provision put other disabled persons at a particular disadvantage when compared with persons who do not have this protected characteristic?

7.3. Did the application of the provision put the claimant at that disadvantage in that he could not attend at Bury?

7.4. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

8. **Section 15: Discrimination arising from disability**

8.1. Did the respondent treat the claimant unfavourably because of something arising in consequence of the disability? The claimant's case is that he was dismissed because he was unable to travel to the respondent's new premises in Bury and that was because of the effects of his disability.

8.2. Does the claimant prove that the respondent treated the claimant as set out in paragraph 8.1 above?

8.3. If so can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

8.4. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

9. **Reasonable adjustments: section 20 and section 21**

9.1. It is common ground that the respondent applied the following provision, criteria and/or practice ('the provision') generally: 9.1.1. requiring staff to work from its Bury premises.

9.2. The respondent accepts that the application of that provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he was unable to travel to Bury from Irlam by public transport.

9.3. Did the respondent take such steps as were reasonable to avoid the disadvantage? The adjustments asserted by the claimant as reasonably required are:
9.3.1. The provision of transport since the claimant did not drive and even if the journey to work time and/or distance were reasonable generally, travel to work by public transport was not reasonably practicable by reason of the claimant's condition.

9.4. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

10. **Breach of contract**

10.1. It is in dispute that the respondent dismissed the claimant.

10.2. If the respondent is found to have dismissed the claimant it is not in dispute that he is entitled to damages in respect of pay in lieu of notice.